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THE AUTHORITY TO REPEAL THE FAIRNESS
DOCTRINE RESTS SOLELY WITH CONGRESS

By Dr. J. Clay Smith, Jr.*
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Chairman Fowler, members of the Commission, ladies and gentlemen, and defenders of the Fairness Doctrine, my name is J. Clay Smith, Jr. I am a Professor of Law at Howard University School of Law. I spent many hours in this room (the FCC Commission meeting room) as Deputy Chief of the Cable Television Bureau, and as Associate General Counsel, and as Acting General Counsel of this agency. I'm honored to participate in this public proceeding. I am here as a representative of the National Bar Association (NBA), and the National Association for the Advancement of Colored People (NAACP). I am authorized to speak for a million and a half people of Afro-American descent. See also, Reply Comments of NBA and NAACP filed in General Docket No. 84-282.

Sixteen years ago, the United States Supreme Court decided Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Under the facts of that case, Justice White, speaking for the Court upheld the Fairness Doctrine, as promulgated by the regulatory process of the Federal Communications Commission. We are

*/Opening remarks (Panel II) during public hearings on the Fairness Doctrine before the Federal Communications Commission on February 6, 1985. General Docket No. 84-282. Other participants on Panel II included Charles Firestone, Bruce Fein, Andrew Schwartzman, Lou Adler, Bev. E. Brown and Ralph Goldberg. See FCC Release, Jan. 28, 1985, (Mimeo. 2204) "Participants, scheduled Set For Fairness Doctrine Hearings." Commissioner Mimi W. Dawson was the team leader for Panel II.

before this Commission today because it questions the efficacy of the Fairness Doctrine. I am here today to assert that the basis of the Notice of Inquiry (General Docket No. 84-282) issued by the Commission is flawed. While these discussions are important and useful, it is the firm position of the NAACP and NBA that only Congress has the authority to abrogate the Fairness Doctrine. As a matter of fact, as Justice White stated in Red Lion, "in adopting the the Fairness Doctrine the Commission was implementing congressional policy rather than embarking on a frolic of its own." at 375. The Court in deciding Red Lion actually focused on the reasonableness of the Fairness Doctrine policy as implemented by the FCC, and determined that the Fairness Doctrine policy was reasonable.

Drawing on the words of Justice White, and the legislative history cited in Red Lion and subsequent opinions, there is no doubt that the Fairness Doctrine is a concept that was conceived in the womb of the constitutional authority of Congress. The Fairness Doctrine is a child of the legislature; it is protected by the Constitution and cannot be aborted by the FCC. Such a course of conduct by the Commission would constitute a "frolic" by the FCC.

Persons who contend that the Fairness Doctrine violates the First Amendment to the U.S. Constitution simply have not read Justice White's opinion carefully. His words are unambiguous -- "the FCC is free to implement the Fairness Doctrine by reasonable rules and regulations which fall short of abridgment

of the freedom of speech and press, and the censorship proscribed by § 326 of the [Communications] Act [of 1934]" at 382. By this language, the court put to rest, and negated claims raised today that the Fairness Doctrine is a per se violation of the First Amendment.

For the purpose of fair debate, let us assume that the FCC repealed the Fairness Doctrine. It is my prediction that citizens, whose legally protected interest under the doctrine are abused by broadcasters will find relief in American courts. I believe that such a possibility creates a far greater risk for broadcasters than the Fairness Doctrine process which is in operation today.

Finally, there appears to be an ominous regulatory rebellion in the wind. This rebellion runs counter to the interests of the American people. This rebellion seems to be guided towards the impermissible conversion of the people's spectrum into a property right of the free enterprise system. It would appear that one of the targets of the rebellion is the Fairness Doctrine. Let us hope that these public proceedings, and the overwhelming support for the Fairness Doctrine embodied in the comments puts an end to this misdirected rebellion.

Thank you.